Petition of the Town of Framingham for a determination of the rates applicable to the transportation and treatment of sewage pursuant to an intermunicipal agreement with the Town of Ashland.

#### INTERLOCUTORY ORDER ON SCOPE OF PROCEEDING

# I. <u>PROCEDURAL HISTORY</u>

On August 8, 2002, the Town of Framingham ("Framingham") filed a petition with the Department of Telecommunications and Energy ("Department"), requesting that the Department determine the annual charges to be paid by the Town of Ashland ("Ashland") to Framingham, "both retroactively and prospectively, for Ashland's use of Framingham's sewerage facilities" (Petition at 1). The parties assert that the Department has jurisdiction over this matter pursuant to St. 1946, c. 86, § 1 ("Special Act"), as amended by St. 1960, c. 406, § 1.

The Special Act provides, in part:

The town of Ashland may enter into an agreement with the town of Framingham for the joint use of the sewerage facilities of the town of Framingham to receive and treat the sewage of the town of Ashland, and shall pay such proportion of the cost of construction of additional works required and such annual charges for the transportation and treatment of sewage as shall be mutually agreed upon by the two towns. If said towns shall be unable to agree as to the proper and just sum which shall be paid by the town of Ashland to the town of

Framingham, either such town may apply to the [Department] for a determination of the matter in controversy.

Special Act, § 1.<sup>1</sup> On August 30, 2002, Ashland filed its Answer to Framingham's petition. On November 25, 2002, the parties filed a Joint Pre-Hearing Memorandum. In the Joint Pre-Hearing Memorandum, the parties set forth arguments regarding the scope of review, specifically, whether the Department may review charges for periods retroactively. In light of the jurisdiction conferred by the Special Act, after review of all relevant documents filed to date,<sup>2</sup> we define the scope of this proceeding as discussed below.

### II. <u>FACTS</u>

For the purpose of defining the scope of these proceedings only, the following is a summary of the relevant facts. On December 9, 1963, pursuant to the Special Act, Framingham and Ashland entered into an Intermunicipal Agreement providing for Ashland's use of Framingham's sewerage facilities (Petition, exh. A ("IMA"); Joint Pre-Hearing Memorandum at 8). The IMA provides, among other things, that Framingham would receive and transport sewage within a specified range of flow rates from Ashland, and that, in

Existing special laws remain in effect unless amended or repealed. Mass. Const. Amend. Art. 2, § 9, as amended by Mass. Const. Amend. Art. 89, § 9.

In addition to the pleadings and the Joint Pre-Hearing Memorandum, the parties submitted documents requested before discovery commenced and have responded to two sets of information requests to date from the Department.

consideration, Ashland would pay annual charges set forth in the IMA (IMA at §§ 1-2). $^3$  The parties further stipulated in the IMA that the annual payments for the first thirty years of the agreement were intended to include payment "for a proportionate share of [Framingham's] capital investment cost" of its sewer system, in addition to a "fair and equitable proportionate share of the actual cost of the maintenance" of the system (id. at § 3). After this thirty-year period, Ashland would be deemed to have made full payment for its proportionate share of investment costs, and that "thereafter any and all payments to [Framingham] shall be for a proportionate share of the cost of maintaining said system only . . ." (id.). The IMA provides that if Ashland directly enters the Metropolitan District Commission<sup>4</sup> system, "the obligations of either party . . . shall terminate" (id. at § 5).

Under the IMA, the annual charges and rates of sewage discharge specified in the agreement "shall be reviewable five years from the date of this agreement and at subsequent five year intervals . . ." (id. at § 5). From the date that the parties executed the IMA, until

The IMA provides that Ashland would pay (1) an annual payment of \$3,000 for the use of a connection at the Farm Pond interceptor with a maximum rate of discharge of 1 million gallons per day, plus an additional annual charge of \$2,000, should Ashland's daily flow exceed that rate; and (2) an annual payment of \$2,500 for use of a connection at the Bates Road sewer with a maximum rate of discharge of 200 gallons per minute (IMA at §§ 1-2).

The parties agree that the Massachusetts Water Resources Authority ("MWRA") is the successor agency (Joint Pre-Hearing Memorandum at 8).

June 29, 2001,<sup>5</sup> Framingham assessed annual charges and accepted payment from Ashland according to the rates specified in the IMA (see Response DTE F-2-4, att. A). The parties disagree about the proper annual charges to be paid, the manner in which to calculate the parties' proportionate shares of the cost of operations and maintenance, as well as the interval for which the Department may review the charges (Joint Pre-Hearing Memorandum at 11, 13).

In addition to obligating Ashland to pay its proportionate share of the costs of maintenance, the IMA obligates Ashland to indemnify and hold harmless Framingham from any and all increased charges levied against Framingham by the MWRA as a result of permitting Ashland to discharge sewage into Framingham's system (IMA at § 6). The parties dispute whether Ashland's alleged discharge of excessive sulfides into Framingham's sewerage system gives rise to any liability of Ashland (Joint Pre-Hearing Memorandum at 12-14).

Beginning in 1998, representatives of Framingham and Ashland discussed modifications to the IMA or the execution of a new IMA, but they did not reach an agreement (id. at 9). The parties agree that, in the spring of 2001, Framingham retained SEA Consultants, Inc. ("SEA"), to produce a cost study, which was provided to Ashland, and that, in June 2001, Ashland retained its own consultant, Vollmer Associates, LLP, ("Vollmer"), to produce a cost study, which was provided to Framingham (id.). On June 29, 2001, Framingham began billing Ashland at a rate based on figures contained in SEA's study (id.). Ashland continued to

The IMA provides that bills are in the form of two installments, rendered six months after actual usage (IMA at § 5). Framingham states that it permitted Ashland to use its sewerage facilities according the rates set forth in the IMA through December 31, 2000 (Petition at 3).

pay Framingham amounts based on the original rates set forth in the IMA (See id. at 10; Response DTE F-2-4, att. A).

# III. POSITIONS OF THE PARTIES

# A. <u>Framingham</u>

Framingham maintains that the Special Act grants "broad authority" to resolve disputes regarding fees under the IMA. Framingham argues that

[w]here a grant of power is expressly conferred by statute upon an administrative officer or board or where a specific duty is imposed upon them, they in the absence of some statutory limitation have authority to employ all ordinary means reasonably necessary for the full exercise of the power and for the faithful performance of the duty.

(Joint Pre-Hearing Memorandum at 1-2, quoting Town Taxi, Inc. v. Police Commissioner of Boston, 377 Mass. 576, 586 (1979)). Framingham asserts that the Special Act expressly conferred the power to resolve disputes between the parties about the amount owed to Framingham without placing any limitation on the scope of the Department's authority to adjudicate these disputes, and therefore, the Department has "plenary authority" (Joint Pre-Hearing Memorandum at 2). Framingham contends that if the legislature had intended the Department to act solely as a rate-setting agency in this case, permitting the Department to review rates applicable only to future charges, the grant of authority in the Special Act would have been far narrower (id.). Therefore, Framingham concludes, the Department may resolve

all disputes between the towns at one time, in a single forum (id. at 3 and n.1).<sup>6</sup> Framingham contends that the Department's general rule against retroactive relief considered in Metropolitan Dist. Comm'n v. Department of Pub. Util., 352 Mass. 18 (1967), does not apply here because the Special Act expands the scope of the Department's authority.

#### B. Ashland

Ashland argues that the Department may only determine prospectively the fees to be paid by Ashland to Framingham for Ashland's use of Framingham's sewerage facilities.

Ashland notes that in Metropolitan District Commission, the court determined: "[t]he department was correct in ruling that it had no power to award reparations. Such a power must be expressly conferred by statute, as it was in the case of carriers . . ." (Joint Pre-Hearing Memorandum at 5, quoting 352 Mass. at 26). In Metropolitan District Commission, the court upheld a ruling by the Department that it did not have the power to order gas or electric companies to make reparations under G.L. c. 164, in contrast with the power, under G.L. c. 166, § 14, to order a railroad corporation to make reparations to persons who have paid an "unjust, unreasonable or unjustly discriminatory rate" (Joint Pre-Hearing Memorandum at 4, citing 352 Mass. at 23).

Ashland argues that because the Special Act does not grant "explicit and express authority," the Department has no authority to award reparations or retroactive payments

Framingham also contends that the Department may review the "enforceability of the rate structure" in the IMA and reform its terms to ensure that Framingham "is treated equitably and fairly compensated for the actual costs of transporting Ashland's sewage" (Joint Pre-Hearing Memorandum at 3 n.1).

(Joint Pre-Hearing Memorandum at 5). Ashland further argues that the phrase in the Special Act, "shall be paid," is an indication of the prospective nature of any awards to be determined (<u>id.</u>). Finally, Ashland argues that the power to grant reparations or retroactive relief should not be implied from a broad statutory grant of authority (<u>id.</u>, <u>citing Newton v. Department of Pub. Utils.</u>, 367 Mass. 667 (1975)).

### IV. <u>ANALYSIS</u>

The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority." Cambridge Electric Light Co., D.P.U. 94-101/95-36, at 19 (1995), citing Town of Concord, et al. v. FERC, 955 F.2d 67, 71 (D.C. Cir. 1992). The doctrine's corollary, the rule against retroactive ratemaking, prohibits the regulatory authority from altering a rate retroactively. 955 F.2d at 71. Some of the considerations underlying the filed rate doctrine include preserving the agency's primary jurisdiction over the reasonableness of rates by ensuring that utilities charge only the rates of which the agency has been made cognizant, establishing the predictability of filed rates, and preventing unjust discrimination. Id. The Department's precedent, as considered in Metropolitan District Commission and Newton, regarding the lack of power to award reparations to ratepayers absent an express statutory grant of authority, is based on the filed rate doctrine.

This proceeding raises none of the policy considerations underlying the filed rate doctrine. The towns of Framingham and Ashland, along with their public works departments, are not entities regulated by the Department. These entities are not required to file tariffs with

the Department. There is no danger of unjust discrimination with respect to different "ratepayers" because the only matters raised here pertain to a bilateral agreement. The Department's jurisdiction over this dispute arises solely out of the Special Act. The Special Act merely permits Framingham or Ashland to seek a determination of "the proper and just sum which shall be paid by the town of Ashland to the town of Framingham." Special Act, § 1. It does not confer to the Department general regulatory authority over rates, terms, and conditions pertaining to Ashland's use of Framingham's sewerage system. Therefore, the filed rate doctrine and the prohibition against retroactive ratemaking do not apply.

Nevertheless, the Department's jurisdiction is not "plenary," as Framingham urges.

The Special Act contemplated that Ashland and Framingham would enter into an agreement for the joint use of Framingham's sewerage facilities and for Ashland's payment of the proportional costs of construction and of operations and maintenance. Special Act, § 1. The Special Act provides that if the parties cannot agree as to "the proper and just sum which shall be paid by the town of Ashland to the town of Framingham" for Ashland's use of Framingham's sewerage facilities, either party could seek from the Department "a determination of the matter in controversy." The Special Act does not confer upon the Department equitable powers to order equitable relief, such as recission.

Equity jurisdiction is an inherent judicial power reserved to the Supreme Judicial Court, the superior courts, and the probate courts. See G.L. c. 215, § 6. Administrative agencies, as creatures of the Legislature, do not sit in equity. Although the Special Act is broad, it does not specifically grant powers in equity, and therefore, the Department will not review requests for equitable relief in this proceeding.

We note that the language of the Special Act is parallel to St. 1885, c. 217, § 13. See Town of Holbrook v. Town of Randolph, 374 Mass. 437 n.1 (1978). In Holbrook, the controlling statute provided that a panel appointed by the Supreme Judicial Court would determine the matter in controversy if the towns of Holbrook and Randolph disagreed as to the charges for the construction and operation of joint water works. In that case, the statute provided that the costs were to be "borne and paid equally." Id. Despite the disproportionate use of water by one of the towns, the court upheld the panel's decision to apportion the costs "equally," rather than provide an equitable apportionment. See id. at 442. In the instant case, the analogous language in the Special Act is the provision that the towns "may enter into an agreement"; i.e., the IMA itself is the basis of apportionment, agreed upon by the municipalities, not imposed by the merely permissive or authorizing Special Act. In exercising our jurisdiction to the full extent authorized by the Special Act to determine matters in

<sup>8</sup> Section 13 of St. 1885, c. 217 provides, in relevant part, as follows:

<sup>[</sup>T]he cost, charges and expenses of construction and maintenance and running of the joint water works and appurtenances, shall be borne and paid equally by the [towns of Randolph and Holbrook] which unite and jointly act; and such towns shall jointly own, hold, and use the same; and each of such towns shall be entitled to an equal share of said waters . . . . In case the said towns which unite and jointly act, or their officers or agents, appointed as provided in this act, cannot agree in any matter arising under or in carrying out the purposes of this act, then the matter in controversy shall be determined by three commissioners, to be appointed by the supreme judicial court, upon application of either of such towns, through its said officers or agents, and notice to the others, whose award when accepted by said court, shall be binding upon all parties.

controversy, we review the parties' rights and obligations under a voluntary contract that the Department presumes to be valid.<sup>9</sup>

We interpret the rights and obligations of the parties under the IMA as follows. The only express condition in the contract that would terminate each party's obligations under the IMA is Ashland's direct entry into the MWRA system. This condition has not occurred. Therefore, performance of each party's obligations under the IMA has not been excused. <sup>10</sup>

Under the IMA, the parties agreed that, in consideration for the use of Framingham's sewerage system, Ashland is obligated to pay \$5,500, annually, to Framingham with adjustments for exceeding specified flow rates (IMA at §§ 1-2). Framingham is obligated to take Ashland's sewage, within specified flow rates, and accept Ashland's installment payments of the IMA annual charge as performance. Ashland's performance on each installment is due six months after actual usage (IMA at § 5).

In this case, the Special Act provides for an application directly to the Department, rather than an application first to the courts, for a determination of the matter in controversy. The Special Act, § 1, provides that either municipality may apply to the Department when the towns prove "unable to agree as to the proper and just sum" to be paid by Ashland. This provision suggests that the Department's role is either to supply a missing term where the parties cannot agree or to construe the parties' agreement itself and determine what is or shall be due and owing.

Framingham cites to precedent in support of the proposition that a municipality cannot be held to a contract that has become inequitable over the passage of time (Joint Pre-Hearing Memorandum at 3 n.1, citing Anglo Fabrics Co., 2002 WL 31187829 (Mass. Super. July 1, 2002)). As we discussed above, we are not reviewing claims for equitable relief. We decline to review whether conditions that have changed materially as a result of the passage of time may excuse either party's performance under the terms of the agreement. Even if we were to review the enforceability of this contract, we would not find that the passage of time has rendered the IMA inequitable, because the IMA permits the parties to revisit charges every five years.

The IMA further provided that for the first thirty years, Ashland's payments to Framingham included its "proportionate share" of the "capital investment cost" of Framingham's sewerage system, and "a fair and equitable proportionate share of the actual cost of the maintenance of said system" (IMA at § 3). The IMA did not terminate automatically upon the end of the first thirty years. The IMA specifies that after thirty years, the payments would be for "a proportionate share of the cost of maintaining said system only" (id.). The parties agreed, however, that the IMA annual charge would be "reviewable five years from the date of this agreement and at subsequent five year intervals . . . " (id. at § 5).

Although the IMA does not detail the meaning of "reviewable," the term implies that if one party gives notice of its intent to renegotiate the annual charge, the other party has the duty to negotiate in good faith. The first party's seeking review of the annual charge at one of those "subsequent five-year intervals" obligates the other party to negotiate. The IMA does not require the parties to reach an agreement; rather, by operation of the Special Act, the parties may seek to have that charge determined by the Department. No duty of the second party to negotiate arises unless the first party has sought review prior to the beginning of the five-year interval<sup>11</sup> or unless failure to seek a timely review is excused. See Restatement (Second) of Contracts, § 225 (non-occurrence of a condition), and comment b (excuse). Seeking review of the charges that prevail in any five-year period must occur prior to the beginning of the next

The most recent "subsequent five-year interval" from December 9, 1963 is December 9, 1998 through December 8, 2003 (See IMA at § 5). We find that the clear language of the IMA provides that the "subsequent five-year intervals" are calculated from the date that the IMA was executed, and not simply a five-year period calculated from any date when a party seeks review of the charges.

succeeding five-year period. When either town has sought review of the annual charges prior to the start of the next five-year interval, 12 then both towns are obligated to negotiate in good faith over the charges for the continuation of Ashland's use of Framingham's system. If, despite good faith negotiations, the towns "shall be unable to agree as to the proper and just sum" to be paid by Ashland, then either town "may apply" to the Department for determination of the annual charges. Special Act, § 1.

Although the parties stipulate that at some point in 1998, representatives of Framingham and Ashland "discussed modifications to the IMA or the execution of a new IMA," <sup>13</sup> a Framingham town meeting document, dated December 2000, notes, "[the IMA] apparently never has been reviewed in a public or formal manner . . . Presently, we are not at one of the five-year intervals; but we have been approached by Ashland to amend the agreement as they would like to increase their flow" (Response DTE A-2-2 ("Report to [Framingham] Town Meeting" (Dec. 2002)) (emphasis added)). The document further indicated that those negotiations were "on hold" (id.). In addition, the document reported that Framingham's public works department was planning to hire an engineering firm to estimate a fair annual payment from Ashland, and that when that estimate is available, Framingham "will"

Meeting this condition was under the control of either party.

Framingham states, however, that it has no responsive documents to Information Request DTE F-2-1, which requested "all documents exchanged between Ashland and Framingham prior to December 9, 1998, pertaining to 'annual charges and rates of discharge' to be applied at any time after December 9, 1998 under the IMA." None of the three documents that Ashland produced in response to an identical information request, DTE A-2-1, can fairly be said to demonstrate that either party was ready to begin formal negotiations over the contract terms.

begin negotiations with Ashland for an increased fee" (<u>id.</u>). The parties stipulate that Framingham retained its consultant in the spring of 2001, and that Ashland retained its consultant in June 2001.

The documents produced to date indicate that, until the spring of 2001 at the earliest, neither party was in a position to engage in good faith negotiations about the proper and just sum to be paid. Therefore, because there is no substantial evidence that Framingham showed a clear intent to request formal negotiations under the IMA prior to December 9, 1998, nor was it in a position to do so, we hold that Ashland had no duty to renegotiate the charges for the period beginning December 9, 1998 through December 8, 2003. The towns are free to contract with one another on mutually agreeable payment terms. Only where those terms are ambiguous and in need of third-party determination, or where the towns cannot mutually arrive at such terms on their own, is there a statutory role for the Department. During the 1998 to 2003 period, the payment terms were not changed and remain clear. The IMA remained in force in accordance with its terms. Hence, there is nothing for the Department to determine for the current period. Accordingly the charges for that period and any prior period are not reviewable. Assuming the parties intend that the IMA is to remain in force from and after December 8, 2003, then the reviewable matters in dispute are the charges applicable beginning

Framingham urges that a municipality cannot be held to have waived its rights. This principle is not applicable here, because Ashland's duty to negotiate the charge for the current period never arose. Rather, it is Ashland that may choose to waive the failure of a condition precedent, <u>i.e.</u>, Framingham's failure to seek review on time, if Ashland expressly agrees to negotiate the charge for the current period.

on December 9, 2003, and the method of determining "a proportionate share of the cost of maintaining [Framingham's] system" <sup>15</sup> (IMA at § 3).

Regarding any indemnity claim by Framingham based on increased charges levied by the MWRA resulting from Ashland's use of Framingham's sewerage system, we hold that such claims would not be subject to the five-year interval limitation. The indemnity clause is a separate obligation given by Ashland (IMA at § 6). Framingham may raise an indemnity claim at any time, once the MWRA has actually levied increased charges. At this time, Framingham's indemnity claim is not yet a matter in dispute, because the MWRA has not levied "increased charges" pursuant to the IMA at § 6 (see Response to DTE-F-1-15, Tab F). In excluding the indemnity claim from this proceeding, we are not precluding the parties from demonstrating whether Framingham's costs of complying with MWRA requirements may be included in the proportion of operations and maintenance cost that Ashland must pay during the next period.

#### V. <u>ORDER</u>

After due notice and consideration, it is

In the event that there is no agreement in place after December 8, 2003, the default standard of review under the Special Act is "the proper and just sum to be paid by . . . Ashland to . . . Framingham . . . ." Special Act, § 1. This standard is essentially the same as "a proportionate share of the cost of maintaining [Framingham's] system."

ORDERED that the scope of this proceeding shall be limited to a review of the fair proportionate share of the cost of maintaining Framingham's sewerage system to be paid by Ashland for use of Framingham's facilities after December 9, 2003 under the 1963 Intermunicipal Agreement.

By Order of the Department,
Paul B. Vasington, Chairman
James Connelly, Commissioner
W. Robert Keating, Commissioner
Eugene J. Sullivan, Jr., Commissioner
Deirdre K. Manning, Commissioner